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19
20 **UNITED STATES DISTRICT COURT**
21
22 **DISTRICT OF NEVADA**

23 MARK HUNT, an individual,
24 Plaintiff,
25 v.
26 ZUFFA, LLC d/b/a ULTIMATE
27 FIGHTING CHAMPIONSHIP, a
28 Nevada limited liability company;
BROCK LESNAR, an individual;
DANA WHITE, an individual; and
DOES 1-50, inclusive,
Defendants.

Case No.: 2:17-cv-00085-JAD-CWH

**MARK HUNT'S POINTS AND
AUTHORITIES IN OPPOSITION TO
DEFENDANT BROCK LESNAR'S
FOURTH REQUEST FOR JUDICIAL
NOTICE PURSUANT TO FEDERAL
RULES OF EVIDENCE RULE 201**

26 Plaintiff, Mark Hunt ("Hunt"), respectfully requests that this Court deny Brock Lesnar's
27 ("Lesnar") Fourth Request for Judicial Notice of Exhibit "B" (Nevada State Athletic Commission
28 Sample Bout Agreement). This Court should exclude Lesnar's extrinsic evidence because the

1 exhibit was not incorporated by reference, is not directly related to Hunt's Supplemental
 2 Complaint, and is neither publicly available nor capable of accurate and ready determination. This
 3 Court's consideration of Lesnar's motion to dismiss Hunt's complaint should be limited to the
 4 pleadings.

5 Hunt has no objection to the consideration of Exhibit A, the hearing transcript from May
 6 22, 2017, on Defendants' first motion to dismiss, for the limited purpose of convenience to the
 7 Court and parties' reference. However, the hearing constituted only the argument of the parties
 8 and the Court's determinations regarding the original complaint. Clearly, Exhibit A does not
 9 affect the outcome of Lesnar's motion to dismiss Hunt's Supplemental Complaint. In fact,
 10 Exhibit A tends to show that any prior deficiency has been cured.

11 Finally, Hunt notes Lesnar's request for judicial notice is futile, regardless of the Court's
 12 consideration of Exhibit B. The plain language of the document states that the State of Nevada,
 13 and not Lesnar, may raise the express assumption of the risk defense. Thus, the document is not
 14 "directly related to Mr. Hunt's [Supplemental] Complaint" as Lesnar claims, ECF No. 116 at
 15 3:11-12, rather, it is only related to a theoretical defense of a nonparty – the State of Nevada.

16 **I.**

17 **LEGAL STANDARD**

18 "[A] district court may not consider any material beyond the pleadings in ruling on a Rule
 19 12(b)(6) motion." *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001) (citing *Branch v.*
 20 *Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994)); *see Cervantes v. City of San Diego*, 5 F.3d 1273, 1274
 21 (9th Cir. 1993) (holding when the legal sufficiency of a complaint's allegation is tested by a
 22 12(b)(6) motion, "review is limited to the complaint."). An exception to this general rule is the
 23 doctrine of judicial notice pursuant to Federal Rule of Evidence 201. A court may take judicial
 24 notice of "matters of public record" without converting a motion to dismiss into a motion for
 25 summary judgment, but may not take judicial notice of a fact that is "subject to reasonable
 26 dispute." Fed. R. Evid. 201(b); *Lee*, 250 F.3d at 689 (citing *MGIC Indem. Corp. v. Weisman*, 803
 27 F.2d 500, 204 (9th Cir. 1986)).

28

II.

COURT'S PREVIOUS DENIAL OF LESNAR'S REQUESTS FOR JUDICIAL NOTICE

At the hearing on Lesnar's first motion to dismiss, other than publicly filed records, the Court denied Lesnar's requests (12 total) for judicial notice of documents outside the four corners of the complaint. The Court explained:

“Although the parties have offered me a number of items outside the four corners of the Complaint, like affidavits, newspaper articles, emails, YouTube videos, UFC policy and press releases, and fight records, suggesting that I can take judicial notice of them, I Decline that request. I am not going to turn this into a motion for summary judgment at this time. I am keeping this within the four corners under 12(b)(6).

These materials, first of all, are not properly the subject of judicial notice. Their meaning is disputed. There is not universal agreement on them.

ECF No. 65 (May 22, 2017 hearing).

III.

ARGUMENT

Judicial Notice of Exhibit B Should be Denied or Extremely Limited

Lesnar asks the Court to go beyond the pleadings to a bout agreement not contained or even referenced in Hunt’s complaint. Exhibit B purports to be a Nevada State Athletic Commission Sample Bout Agreement. The title alone is instructive here. It is a “sample” agreement. It is not executed by Hunt, UFC, or Lesnar. However, Lesnar not only asks the Court to acknowledge the existence of the Sample Bout Agreement, he asks the Court to pretend it is a fully executed copy, and then pretend Lesnar would be a party to even an executed copy of the agreement. That is, Lesnar asks the Court to consider one document for purposes of taking judicial notice (a sample bout agreement), but consider another document for its substantive analysis (a fully executed bout agreement). Indeed, if the agreement were “publicly available and capable of accurate and ready determination,” then Lesnar would have attached an executed copy.¹

¹ Even ignoring the fact that evidentiary declarations are improper for substantive Rule 12(b)(6) motions, the

1 Notably, the bout agreement Lesnar seeks to introduce is the Nevada State Athletic
 2 Commission's Official Bout Agreement. This is *not* referenced in any manner in Hunt's
 3 complaint, which refers and incorporates only the UFC 200 Bout agreement. To clarify any
 4 potential confusion, both documents are coincidentally titled "Exhibit B." Exhibit B to Hunt's
 5 complaint is the UFC 200 Bout Agreement; Lesnar's Exhibit B is a different document, which
 6 was neither incorporated, referenced or relied upon in Hunt's complaint. Therefore, the Court
 7 should decline to consider the Sample Bout Agreement.

8 This Court should deny Lesnar's request for judicial notice of Exhibit B, however, to the
 9 extent the Court takes judicial notice of Exhibit B, it should be limited to the mere fact that the
 10 document exists, because the contents and interpretation of the document is highly disputed. *See*
 11 *Montana Dep't of Revenue v. Blixseth*, No. 2:13-CV-01324-JAD, 2016 WL 1183084, at *2 (D.
 12 Nev. Mar. 28, 2016) (denying request for judicial notice to the extent it seeks judicial notice of
 13 the truth of its contents); *see also Carrillo v. Gillespie*, No. 2:12-CV-02165-JAD, 2014 WL
 14 1307454, at *7 (D. Nev. Mar. 28, 2014) (holding the Court could not take judicial notice of the
 15 truth or perjury regarding contents of police officer's sworn statement, because it was "subject to
 16 reasonable dispute" (interpreting Fed. R. Evid. 201)).

17 **IV.**

18 **CONCLUSION**

19 For the above reasons, Hunt respectfully requests that the Court deny Lesnar's request for
 20 judicial notice of Exhibit B.

21 DATED: April 6, 2018

HIGGS FLETCHER & MACK LLP

22 By: /s/ Joseph A. Gonnella

23 CHRISTINA M. DENNING, ESQ.

24 SCOTT J. INGOLD, ESQ.

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26 Attorneys for Plaintiff

27 MARK HUNT

28 supporting declaration of Kendelee L. Works lacks foundation regarding the contents and execution of an agreement
 between Hunt and the State of Nevada.

CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Civil Procedure 5 and the Court's Local Rules, the undersigned hereby certifies that on this day, April 6, 2018, a copy of the foregoing document entitled **MARK HUNT'S POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT BROCK LESNAR'S FOURTH REQUEST FOR JUDICIAL NOTICE PURSUANT TO FEDERAL RULES OF EVIDENCE RULE 201** was filed and served through the Court's electronic filing system (CM/ECF) upon all registered parties and their counsel.

/s/ Barbara Lodovice
Barbara Lodovice
An employee of Higgs Fletcher & Mack LLP